

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 3**

**GEORGE J. MARTIN & SON, INC.**

**and**

**Case 03-CA-188649**

**MICHAEL DEORIO, an Individual**

**GENERAL COUNSEL'S REPLY TO RESPONDENT'S OPPOSITION TO GENERAL  
COUNSEL'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Counsel for the General Counsel renews its application for partial summary judgment pursuant to Sections 102.35(a)(8), 102.24 and 102.25 of the Board's Rules and Regulations as Respondent George J. Martin & Son, Inc.'s Opposition fails to raise any issue precluding this relief. The General Counsel urges the Administrative Law Judge (ALJ) to grant the General Counsel's outstanding motion, requesting partial summary judgment and issue a Decision and Order precluding Respondent from contesting: (1) the start date of its backpay obligation, (2) the General Counsel's gross backpay and fund contribution calculations, and (3) the General Counsel's calculations as to Respondent's excess tax liability in this matter.

**I. INTRODUCTION**

General Counsel's Motion for Partial Summary Judgment, filed with the ALJ on March 26, 2018, sets forth the operative facts. Pursuant to the ALJ's Order, Respondent filed its Opposition to the General Counsel's Motion for Partial Summary Judgment on April 5, 2018. Respondent's Opposition urges that the ALJ should deny the General Counsel's motion because a) Respondent does not contest the backpay start date, b) it had insufficient knowledge of interim earnings to offer alternate calculations to those in the compliance specification, and c) it only admitted the portion of paragraph VII of the Compliance Specification and Notice of Hearing

which stated that the discriminatee's excess tax liability totaled "\$0" for both federal and state taxes. This Reply will address each of these contentions in turn.

## **II. RESPONDENT DOES NOT CONTEST THE BACKPAY START DATE**

In its Amended Answer to the Compliance Specification, Respondent denied paragraph I, which reads "the backpay period for DeOrio begins on September 26, 2016, the date of his termination, and ends on October 30, 2017 when Respondent made a valid offer of reinstatement." Respondent did not state in its Amended Answer that it was only denying part of the paragraph. In its Motion for Partial Summary Judgment, the General Counsel explicitly stated that it was only requesting summary judgment on the portion of paragraph I that states that the backpay period begins September 26, 2016.

Respondent, in its Opposition to the General Counsel's Motion for Partial Summary Judgment, states that it "does not contest that DeOrio's backpay period begins on September 26, 2016." General Counsel did not request summary judgment on the October 30, 2017 end date to the backpay period because that date was not specifically found in the Administrative Law Judge's decision. General Counsel acknowledges that the end date of the backpay period remains in dispute, and that Respondent has the right to enter testimony, documents, and arguments concerning the end date of the backpay period. Because Respondent admits that the backpay start date is September 26, 2016, summary judgment on that portion of paragraph I, as requested by the General Counsel, is appropriate.

## **III. RESPONDENT HAD SUFFICIENT INFORMATION TO PROVIDE ALTERNATE CALCULATIONS IN ITS AMENDED ANSWER TO THE COMPLIANCE SPECIFICATION**

Respondent argues that its failure to provide alternative calculations to the Region's gross backpay and fund contribution calculations is not such a significant defect in its Amended Answer as to warrant summary judgment on paragraphs II, IV, V, and VI of the Compliance

Specification. However, as noted in the General Counsel's Motion for Partial Summary Judgment, the General Counsel seeks only summary judgment on the gross backpay and fund contribution calculations. Though Respondent should be precluded from contesting the General Counsel's gross backpay and fund contribution calculations based on its defective answer,

The General Counsel acknowledges, however, that Respondent's general denials of certain aspects of interim earnings pled in the Compliance Specification may be sufficient to require a hearing in which Respondent will be required to carry its burden to prove interim earnings. M.D. Miller Trucking & Topsoil, Inc., 363 NLRB No. 49, slip op. at 5 (2015). ... Moreover, the General Counsel acknowledges that Respondent disputes the date when the backpay period ended and a hearing will be required in which Respondent will be required to carry its burden under Dean General Contractors, 285 NLRB 573 (1987). (GC Motion for Partial Summary Judgment, fn. 1).

Clearly, the General Counsel does not contest that Respondent has the right to introduce evidence on interim earnings, mitigation or lack thereof, the backpay end date, or anything else other than the gross backpay and fund contribution calculations.

Further, Respondent's argument that it did not have sufficient knowledge to proffer alternative gross backpay and fund contribution calculations is belied by the fact that the information used to calculate gross backpay and fund contributions is well within Respondent's knowledge. As a signatory contractor, Respondent is well aware of the wages and benefits paid to union members. Moreover, Respondent's owner is a trustee of the Union's benefit fund, so it has the information used to calculate Health and Welfare, Pension, Annuity, and National Electrical Benefit Fund contributions. Finally, Respondent is certainly in possession of DeOrio's payroll records from the time he was employed by Respondent. The Compliance Officer used those records, provided to the Region by Respondent, to calculate DeOrio's average earnings for the Compliance Specification. Respondent knew the start date of the backpay period from the Administrative Law Judge's decision. It had knowledge of the date it made DeOrio a valid offer of reinstatement. Even if Respondent were to proffer some alternative backpay end date,

Respondent could have offered alternative calculations on the gross backpay and fund contribution calculations with the information it had at the time it submitted its Amended Answer.<sup>1</sup>

Respondent's argument that summary judgment on paragraphs II, IV, V, and VI is inappropriate because it could not have provided alternative calculations must fail for two reasons. First, because Respondent had within its knowledge and control the information used by the Compliance Officer to calculate gross backpay and fund contributions. Second, because summary judgment on the gross backpay and fund contribution calculations would not impede Respondent from presenting evidence at the hearing that would impact the net backpay calculation, such as evidence on mitigation. Issues such as DeOrio's mitigation or lack thereof, his inability to drive to work opportunities within the Union's geographical range, and the realities of Respondent's business are properly taken into account in determining net, not gross, backpay and fund contributions. Therefore, summary judgment for the gross backpay and fund contribution calculations in paragraphs II, IV, V, and VI of the Compliance Specification is appropriate.

#### **IV. RESPONDENT ADMITTED THE ENTIRETY OF PARAGRAPH VII OF THE COMPLIANCE SPECIFICATION OR FAILED TO ADEQUATELY DENY IT**

Paragraph VII of the Compliance Specification contains eight subparagraphs, (a) through (h). Unlike other paragraphs, where Respondent's Amended Answer explains in several paragraphs exactly what it denies and why, Respondent's response to paragraph VII in its

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<sup>1</sup> To the extent Respondent argues that the General Counsel's gross backpay and fund contributions failed to take into account "the realities of Respondent's workforce, available projects, locations of available projects, and the significant reduction in its workforce during the relevant period," it is unclear how Respondent can also argue that this is a factor not within its knowledge or control. The realities of Respondent's workforce should be squarely within Respondent's knowledge.

Amended Answer states in full, “Respondent agrees that DeOrio did not suffer any adverse tax consequences, and thus is owed no award for Total Excess Tax or any other alleged tax consequence.” General Counsel took this brief response as an admission of paragraph VII, and moved for summary judgment on this basis. Respondent’s failure to state that it denied seven of the eight subparagraphs in paragraph VII supports this conclusion and summary judgment is appropriate on those grounds. Even if this is incorrect, summary judgment is still appropriate as detailed below.

Respondent apparently meant to admit only paragraph VII(f), which states that the adverse tax consequence is \$0. (A footnote to paragraph VII(f), which Respondent did not address, notes that additional excess taxes may still be owed on the interest once the amount is liquidated.) Respondent provided no answer to the other seven subparagraphs of paragraph VII aside from its catchall paragraph stating that if anything was not specifically admitted, denied, or addressed, Respondent denied the allegation or calculation. This catchall paragraph is certainly not a sufficient denial under the Board’s rules. Section 102.56(b) states that:

The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent’s position as to the applicable premises and furnishing the appropriate supporting figures.

Section 102.56(c) provides in part that, where a respondent files an answer, but:

...fails to deny any allegation of the specification in the manner required by [Section 102.56(b)], and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the

Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

Even if Respondent meant only to admit that DeOrio's adverse tax consequence was \$0, and to deny the rest of paragraph VII, it failed to do so in a manner consistent with the Board's rules and regulations. Respondent did not explain why it disagreed with the Region's statement of law that under Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10 (2014), DeOrio is entitled to be compensated for any adverse tax consequences of receiving backpay as a lump sum. Respondent did not explain why it denied the formula used by the Compliance Officer to determine what the appropriate excess tax award should be. Respondent did not explain why it denied the amount of taxable income per year as summarized in Appendix 5. Nor did it explain why it disagreed with the Compliance Officer's calculations of taxes, the lump sum award, or the basis for calculating 2018 taxes. Respondent did not explain why it denied that any excess tax liability payment made to DeOrio would also be taxable income and cause additional tax liability, as calculated in Appendix 5. Finally, Respondent did not explain why it denied that the total excess tax is the tax consequence for DeOrio receiving a lump sum award in a year other than when it was earned.

General Counsel maintains that summary judgment is appropriate as to paragraph VII. Summary judgment is appropriate because Respondent admitted the paragraph. Alternatively, summary judgment is appropriate as to paragraph VII(f) because Respondent admits that the adverse tax consequence was \$0, and summary judgment is appropriate as to the remainder of paragraph VII because Respondent failed to deny the paragraph with the specificity required by the Board's rules and regulations.

## V. CONCLUSION

Respondent has not provided a sufficient legal basis on which to dismiss Counsel for the General Counsel's Motion for Partial Summary Judgment. As has been discussed, Respondent's admission that its backpay obligation begins September 26, 2016 is consistent with the General Counsel's argument in its Motion for Partial Summary Judgment, and therefore summary judgment is appropriate concerning this allegation. Further, Respondent's argument as to its burden of providing alternative calculations in its Amended Answer to the Compliance Specification fails in light of the Board's requirements and the General Counsel's acknowledgement that Respondent should be allowed to introduce evidence on the aspects of interim earnings it raises in its Opposition to General Counsel's Motion for Partial Summary Judgment. Finally, Respondent either admitted paragraph VII, or admitted paragraph VII(f) and failed to deny paragraphs VII(a) through (e), (g), and (h) in a manner consistent with the Board's rules and regulations. Thus, summary judgment is appropriate for every issue raised by Counsel for the General Counsel. The General Counsel's Motion for Partial Summary Judgment should be granted.

Dated at Albany, New York this 10<sup>th</sup> day of April, 2018

Respectfully submitted,

/s/ Alicia E. Pender

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